

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Cullen Sheehan, Campaign Manager,
Coleman for Senate,

Complainant,

ORDER OF DISMISSAL

vs.

Al Franken,

Respondent.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge Barbara L. Neilson on November 7, 2008, at 3:00 p.m. in Courtroom 11 of the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101. The hearing was held pursuant to Minn. Stat. § 211B.34 to consider a complaint filed by Complainant on October 30, 2008. On November 3, 2008, the undersigned Administrative Law Judge determined that the Complaint set forth a *prima facie* violation of § 211B.06 with respect to one of the allegations made in the Complaint.

Frederic W. Knaak, Attorney at Law, Knaak & Kantrud, 3500 Willow Lake Blvd., Suite 800, Vadnais Heights, MN 55110, appeared on behalf of the Complainant, Cullen Sheehan. David L. Lillehaug and Christopher A. Stafford, Attorneys at Law, Fredrikson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, MN 55402-1425, appeared on behalf of the Respondent, Al Franken.

Based upon the record and all of the proceedings in this matter, and for the reasons stated in the attached Memorandum, the Administrative Law Judge finds that there is not probable cause to believe that the Respondent violated Minn. Stat. § 211B.06.

ORDER

IT IS HEREBY ORDERED that the Complainant has failed to demonstrate probable cause to believe that the Respondent violated Minn. Stat. § 211B.06 with respect to the statement that Senator Coleman was ranked or named the fourth most corrupt Senator by a bipartisan watchdog group. Accordingly, the Complaint is DISMISSED.

Dated: November 13, 2008

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal. If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Background

The Complaint concerns the 2008 Minnesota U.S. Senate race. The Complainant, who is Senator Norm Coleman's campaign manager, alleges that Al Franken knowingly authorized and broadcast on television and radio false political advertising designed to injure or defeat the candidacy of Senator Coleman. The television advertisement at issue stated that Senator Coleman is "[r]anked the 4th most corrupt senator in Washington" by a "bipartisan watchdog group," and displayed a reference to "Center for Responsibility and Ethics in Government." The radio advertisement similarly stated that "a bipartisan watchdog group has named Norm Coleman the fourth most corrupt Senator in America."¹

It is undisputed that the statement involved in this case is based on material issued by Citizens for Responsibility and Ethics in Washington (CREW). CREW operates a website, which is found at www.crewsmostcorrupt.org. The heading on the website is "The 20 Most Corrupt Members of Congress (and 4 to watch)." The website contains a link to CREW's "2008 annual report - our fourth edition - on congressional corruption." The full report, which is 240 pages long,

¹ Ex. 12 (CD-ROM containing advertisements at issue). A separate allegation contained in the complaint asserted that the same advertisements also falsely claimed that Senator Coleman is "living almost rent free in a million dollar home of a Washington insider." The Administrative Law Judge determined on November 3, 2008, that this statement did not fall within the purview of Minn. Stat. § 211B.06 because it reflects an opinion and is not a statement capable of being proven factually true or false.

also was received as an exhibit at the probable cause hearing.² The Table of Contents for the Report contains the following headings and lists:

The Violators

- A. Members of the House
 - I. Vern Buchanan (R-FL)
 - II. Ken Calvert (R-CA)
 - III. John Doolittle (R-CA)
 - IV. Tom Feeney (R-FL)
 - V. Vito Fossella (R-NY)
 - VI. William Jefferson (D-LA)
 - VII. Jerry Lewis (R-CA)
 - VIII. Dan Lipinski (D-IL)
 - IX. Gary Miller (R-CA)
 - X. Alan Mollohan (D-WV)
 - XI. Tim Murphy (R-PA)
 - XII. John Murtha (D-PA)
 - XIII. Steve Pearce (R-NM)
 - XIV. Charles Rangel (D-NY)
 - XV. Rick Renzi (R-AZ)
 - XVI. Harold Rogers (R-KY)
 - XVII. Don Young (R-AK)
- B. Members of the Senate
 - I. Mary Landrieu (D-LA)
 - II. Mitch McConnell (R-KY)
 - III. Ted Stevens (R-AK)
- C. Dishonorable Mentions
 - I. Marsha Blackburn (R-TN)
 - II. *Norm Coleman (R-MN)*
 - IV.[sic] Laura Richardson (D-CA)
 - V. [sic] Mike Turner (R-OH)³

It is evident that the members of Congress named by CREW under these categories are arranged in alphabetical order. The Executive Summary of the 2008 CREW Report includes the following language:

New to this year's list are Reps. Marsha Blackburn, Vern Buchanan, Vito Fossella, Dan Lipinski, Charlie Rangel, Laura Richardson and Mike Turner, and Sens. Mary Landrieu and *Norm Coleman*. . . . Of this year's *list of 24*, at least 12 are under investigation⁴

² Ex. 2.

³ Ex. 2, second and third unnumbered pages (emphasis added).

⁴ Ex. 2 at 1 (emphasis added).

CREW's website contains a "Report Summary" that lists "[t]he 20 most corrupt members of Congress" (combining both House and Senate members) and the four "[d]ishonorable mentions" as follows:

The 20 most corrupt members of Congress

- Rep. Vern Buchanan (R-FL)
- Rep. Ken Calvert (R-CA)
- Rep. John T. Doolittle (R-CA)
- Rep. Tom Feeney (R-FL)
- Rep. Vito J. Fossella (R-NY)
- Rep. William J. Jefferson (D-LA)
- Sen. Mary Landrieu (D-LA)
- Rep. Jerry Lewis (R-CA)
- Rep. Daniel Lipinski (D-IL)
- Sen. Mitch McConnell (R-KY)
- Rep. Gary G. Miller (R-CA)
- Rep. Alan B. Mollohan (D-WV)
- Rep. Timothy F. Murphy (R-PA)
- Rep. John P. Murtha (D-PA)
- Rep. Steve Pearce (R-NM)
- Rep. Charles B. Rangel (D-NY)
- Rep. Rick Renzi (R-AZ)
- Rep. Harold Rogers (R-KY)
- Sen. Ted Stevens (R-AK)
- Rep. Don Young (R-AK)

Dishonorable mentions

- Rep. Marsha Blackburn (R-TN)
- Rep. Laura Richardson (D-CA)
- Sen. Norm Coleman (R-MN)
- Rep. Michael Turner (R-OH)

The website lists these individuals in alphabetical order but does not incorporate Roman numerals or any other type of numbering scheme. All told, there are three senators identified on CREW's list of the "20 Most Corrupt Members of Congress," and one senator (Senator Coleman) identified on CREW's list of "Dishonorable Mentions." Of those identified on both lists, seven are Democrats and seventeen are Republicans.

Arguments of Parties

The Complainant and the Respondent did not appear at the probable cause hearing except through counsel. The Complainant, who bears the burden of proof in this matter, elected to rely on the Complaint, the attachments thereto, and two additional exhibits submitted in support of a probable cause determination. The additional exhibits are a transcript of excerpts from a program on KSTP-Channel 5 that aired on October 29, 2008,⁵ and a copy of an article published in the *Star Tribune* on October 30, 2008.⁶ The Respondent offered Exhibits 2-12 and 16-17 for purposes of the probable cause hearing.

The Complainant alleges that the statement in the advertisements that Senator Coleman is "ranked" or "named" the "4th most corrupt" Senator is false

⁵ Ex. C.

⁶ Ex. D.

because he is not, in fact, included among the twenty members of Congress identified on CREW's "20 most corrupt" list but instead appears on CREW's list of "Dishonorable Mentions." The Complainant points out that KSTP-TV determined for those same reasons that the claim was false in a "Truth Test" report broadcast on October 29, 2008.⁷ The Complainant also emphasizes that Melanie Sloan, the Executive Director of CREW, stated in an article published in the Star Tribune on October 30, 2008, that CREW never actually ranked people on the list and called the ranking an exaggeration.⁸

In contrast, the Respondent contends that the statement made in the advertisements is, in fact, true. He points out that Ms. Sloan was quoted in an October 30, 2008, *City Pages* article as saying that "it would be correct to say Coleman is one of the four most corrupt senators according to their [CREW's] report because 96 other senators did not make the list at all."⁹ Ms. Sloan attested to the accuracy of this view in an affidavit offered by the Respondent at the probable cause hearing.¹⁰

The Complainant further contends that the portion of the statement describing CREW as a "bipartisan watchdog group" is false. In support of this allegation, the Complainant maintains that four of the six board members of CREW have ties to Mr. Franken and/or the Democratic party,¹¹ the KSTP-TV broadcast described CREW as a "liberal leaning" organization,¹² and some newspaper articles have characterized CREW as a "liberal" group which targets Republican members of Congress in "all but a handful of its complaints" and has received much of its funding from liberal groups and donors to Democratic candidates and causes.¹³

⁷ In the broadcast, KSTP-TV noted that Senator Coleman "is not even in the top 20 most corrupt members of Congress as judged by this liberal leaning organization. He is simply listed among four members of Congress who get dishonorable mention. That's based solely on questions about his rent payments which have not been found to be improper." Ex. C.

⁸ Ex. D.

⁹ Ex. 4.

¹⁰ Ex. 3, ¶ 6.

¹¹ Specifically, the Complainant asserts that Melanie Sloan, the Executive Director of CREW and one of its board members, has previously served in various staff positions for Democratic members of Congress and has made 50 separate appearances on Mr. Franken's radio show; CREW board member Daniel Berger has contributed \$44,500 to the Democratic Senatorial Campaign Committee during this election cycle and has donated the maximum amount permitted by federal law to the Franken for Senate campaign; CREW board member John Luongo has donated \$2,000 to the Franken for Senate campaign; and CREW board member Craig Kaplan has contributed \$5,000 to the Democratic Senatorial Campaign Committee. According to the Complainant, the Democratic Senatorial Campaign Committee has injected \$4 million into Minnesota media markets since October 10, 2008, to defeat Senator Coleman.

¹² Ex. C.

¹³ The Complainant alleges that the Capitol Hill newspaper *Roll Call* described CREW as "a liberal watchdog group" in a 2005 column and noted in a January 29, 2008, article that "[s]everal news stories—in this newspaper as well as in the Washington Post, the Wall Street Journal and others—have pointed out that much of CREW's funding comes from liberal groups and big donors to Democratic candidates and causes. And all but a handful of its complaints against

In response, the Respondent asserted that CREW is a non-partisan tax-exempt organization under section 501(c)(3) of the Internal Revenue Code.¹⁴ Such organizations are “absolutely prohibited from directly or indirectly participating in, or intervening in any political campaign on behalf of (or in opposition to) any candidate for elective public office” or from engaging in voter education or registration activities “that (a) favor one candidate over another; (b) oppose a candidate in some manner; or (c) favor a group of candidates. . . .”¹⁵ The Respondent further argues that the bipartisan nature of CREW is demonstrated by virtue of the fact that the organization “investigates government officials regardless of Republican or Democratic affiliation and issues criticism in a bipartisan fashion.”¹⁶ Respondent provided several letters at the probable cause hearing showing that CREW has requested that Congress initiate investigations of several Democratic members of Congress.¹⁷ The Respondent also introduced at the probable cause hearing a copy of a City Pages article in which Ms. Sloan denied that CREW was a Democratic-leaning organization with ties to Franken. Ms. Sloan is quoted as telling the reporter that CREW targets both Republicans and Democrats and has “no ties to the Franken campaign.”

Legal Standard and Analysis

At this stage of the proceeding, the presiding Administrative Law Judge is required to determine whether there is probable cause to believe that Respondent violated Minn. Stat. § 211B.06. The focus is whether, given the facts disclosed by the record, it is fair and reasonable to require the Respondent to go to hearing on the merits. If the Judge is satisfied that the facts appearing in the record, including reliable hearsay, establish a reasonable belief that the Respondent has committed a violation and that these facts would preclude the granting of a motion for a directed verdict, were one to be made, a motion to dismiss for lack of probable cause should be denied. The burden of proof is on the Complainant to show that there is probable cause to believe that the violation of law alleged in the complaint has occurred.

Members of Congress have targeted Republicans.” The Complainant asserts that a March 30, 2005, editorial published in *The Hill* (another Capitol Hill newspaper) stated that “[i]n the overwhelming majority of complaints and critiques detailed in news release [sic] posted on CREW’s website, Republicans or their allies are the targets.” Finally, the Complainant contends that a March 14, 2006, article in *The Hill* reported that CREW had “publicized four ethics complaints against Republican lawmakers since the beginning of this year [2006]” and questioned whether CREW’s political activities could violate IRS rules governing tax-exempt groups.

¹⁴ Ex. 3 (Affidavit of Melanie Sloan), ¶ 2. CREW’s main website describes the organization as “a nonprofit 501(c)(3) organization dedicated to promoting ethics and accountability in government and public life by targeting government officials -- regardless of party affiliation -- who sacrifice the common good to special interests.” See <http://www.citizensforethics.org/about>.

¹⁵ See Instructions to IRS Form 1023 – Application for Tax Exempt Status (available at www.irs.gov/instructions/i1023/ar01.html#d0e119).

¹⁶ *Id.*, ¶ 3.

¹⁷ See Exs. 8-11.

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

For a violation of section 211B.06 to be found, two requirements must be met: (1) a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material; and (2) the person preparing, disseminating, or broadcasting the material must know that the item is false, or act with reckless disregard as to whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate's conduct. In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.¹⁸

The burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.¹⁹ A statement is substantially accurate if its "gist" or "sting" is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.²⁰

After reviewing the Complaint, its attachments, and the additional evidence and argument offered by the parties at the probable cause hearing, the Administrative Law Judge concludes that the Complainant has not established probable cause to believe that Respondent violated Minn. Stat. § 211B.06 with respect to the advertisements at issue. The CREW report and website did not rank the members of Congress identified in each category or explicitly rank or name Senator Coleman the fourth most corrupt Senator. However, CREW's listing of the twenty "most corrupt" and the "four to watch" did identify, in total, just four senators, with Senator Coleman being one of CREW's "four to watch."

¹⁸ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

¹⁹ *Jadwin*, 390 N.W.2d at 441.

²⁰ *Id.*

Moreover, based on the reference in CREW's Executive Summary to the "list of 24," there is an objective basis for the inference drawn in the Franken advertisements that Senator Coleman was the fourth Senator on the overall list of 24. As noted above, the statute does not prohibit the making of unfavorable deductions or inferences based on fact. Because the statement made in the Franken advertisements accurately captures the "gist" or "sting" of Senator Coleman's placement in the CREW listing of the 20 "most corrupt" members of Congress and "four to watch," there is not probable cause to believe that a violation of the statute has occurred. The statement is substantially accurate, if not literally true in every detail. Hearing that Senator Coleman is the "fourth most corrupt Senator" according to CREW produces essentially the same effect on the mind of an individual seeing or hearing the advertisements as hearing that he is one of only four Senators named in the CREW report on congressional corruption.

The remaining portion of the statement challenged by the Complainant is the characterization of CREW as a "bipartisan watchdog group." However, this phrase, standing alone, cannot form the basis of a 211B.06 violation. The statute prohibits the broadcast of false paid political advertising or campaign material "with respect to the personal or political character or acts of a candidate."²¹ Because the characterization of CREW as a "bipartisan watchdog group" does not relate to the personal or political character or acts of Senator Coleman, it does not fall within the purview of Minn. Stat. § 211B.06.

Moreover, the characterization of CREW as a "bipartisan watchdog group" is more a matter of opinion than a statement that can be proven factually true or false. The evidence presented at the probable cause hearing demonstrated that CREW is a nonprofit watchdog group that criticizes both Republican and Democratic members of Congress. Of the twenty "most corrupt members of Congress, six were Democrats and fourteen were Republicans. Of the four "dishonorable mentions," one was a Democrat and three were Republicans. Given the bipartisan nature of the 2008 Annual Report, it cannot be said that the phrase "bipartisan watchdog group" is provably false. Under these circumstances, the Complainant's claim that some members of CREW's board have made donations to Democratic candidates and that much of CREW's funding comes from liberal sources, even if true, would be insufficient to establish that the characterization of CREW as a "bipartisan watchdog group" is factually false. Accordingly, the Complaint must be dismissed.

Because the Complainant has not demonstrated probable cause to believe that the statement made in the advertisements at issue is false, it is unnecessary to address Respondent's further argument that dismissal is appropriate because there has not been an adequate showing that Al Franken

²¹ Minn. Stat. § 211B.06, subd. 1 (emphasis added)

either knew the statement was false or communicated it “with a high degree of awareness” of its probable falsity.²²

The Respondent has requested an award of fees and expenses under Minn. Stat. § 211B.36, subd. 3. This statute allows the assigned Administrative Law Judge to order a complainant to pay the respondent’s reasonable attorney’s fees and costs of the Office of Administrative Hearings as a sanction if the Judge determines the complaint was frivolous. Because the Complaint in this matter was not frivolous, the Respondent’s request for attorney’s fees and costs is denied.

B. L. N.

²² See *St. Amant*, 390 U.S. at 731; *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Riley*, 713 N.W.2d at 401.